Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

LOOMIS FARGO & CO.,

Petitioner,

v.

JOHN KEELEY, TIMMIE ORANGE, ARIEL KILPATRICK, CHARLES WERDANN, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT L. THOMPSON
Counsel of Record
DAVID M. VAUGHAN
ELARBEE, THOMPSON & TRAPNELL, LLP
Attorneys for Petitioner
800 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-6700

155458

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Whether the authority of the federal courts is limited by principles of federalism, such that, when interpreting an issue of state law, a federal court must consider the state's interpretation of its own law?

2. Whether the United States Court of Appeals for the Third Circuit exceeded its authority by striking down a New Jersey administrative regulation as invalid under New Jersey law, without considering New Jersey's opinion that the regulation was valid?

PARTIES TO THE PROCEEDING

The petitioner in this case, defendant and appellee below, is Loomis Fargo & Co. The respondents in this case, plaintiffs and appellants below, are John Keeley, Timmie Orange, Ariel Kilpatrick, and Charles Werdann.

STATEMENT PURSUANT TO RULE 29.6

Burns Security (formerly Borg-Warner Security Corp.) owns forty-nine percent of the stock of Petitioner, Loomis Fargo & Co.

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Petitioner Loomis Fargo & Co. ("Loomis Fargo") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257 (3d Cir. 1999) (App. A). The opinion of the United States District Court for the District of New Jersey is reported at *Keeley v. Loomis Fargo & Co.*, 42 F. Supp. 2d 442 (1998) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on July 19, 1999. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on August 27, 1999 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * *

New Jersey Wage and Hour Law

Pertinent sections of the New Jersey Wage and Hour Law, N.J. Stat. § 34:11-56a1, *et seq.* (1999), and the administrative regulation at issue, N.J.A.C. § 12:56-19.3 (1998), are provided at App. D.

STATEMENT OF THE CASE

The fundamental question in this case is whether the authority of the federal courts, like that of Congress, is limited by principles of federalism. This question arises in the context of a federal court's duty to interpret state law in a diversity case. In this case, the Third Circuit Court of Appeals was called upon to determine whether a New Jersey administrative regulation was a valid exercise of the New Jersey Labor Commissioner's authority under the New Jersey Wage and Hour Law. The New Jersey Attorney General appeared as an amicus curiae on behalf of the State of New Jersey, setting forth the State's position that the regulation was valid under New Jersey law. Nevertheless, the Court of Appeals failed to consider the State's interpretation of its own law, striking down the regulation as invalid under the appellate court's contrary interpretation of State law. To fully appreciate the significance of the issue presented by this case, it is helpful to consider the history of wage and hour regulation by both the federal and state governments, and the background behind the regulation at issue.

A. The power to regulate employee wages and hours is divided between the federal and state governments.

Traditionally, the power to regulate employee wages and hours was reserved to the states. *See West Coast Hotel Co.*

v. *Parrish*, 300 U.S. 379, 398-99 (1937) (upholding state of Washington's minimum wage law as within the state's police power). In 1938, however, Congress exercised its commerce power to legislate in the area, enacting the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* The FLSA generally requires that employers pay their employees for overtime work at a rate of one-and-one-half times the employees' regular hourly wages. 29 U.S.C. § 207(a). Congress exempted certain employees from entitlement to this overtime premium, including certain employees of motor carriers such as Loomis Fargo. 29 U.S.C. § 213(b)(1). Plaintiffs admit that they are exempt from the overtime requirements of the FLSA under Section 13(b)(1). (Complaint, ¶ 6.)

Despite venturing into this traditionally state-regulated area, Congress explicitly left to the states the power to implement wage and hour laws more stringent than the federal statute. The FLSA's "savings clause" provides that

> [n]o provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the chapter or a maximum workweek lower than the maximum workweek established under this chapter . . . .

29 U.S.C. § 218(a).

B. Background behind New Jersey's overtime regulation for trucking industry employees.

The New Jersey legislature enacted the current New Jersey Wage and Hour Law on June 17, 1966, and it became

effective December 14, 1966.[1] Like the FLSA, the New Jersey Wage and Hour Law generally provides for the payment of time-and-a-half an employee's regular hourly rate for overtime worked. N.J. Stat. § 34:11-56a4 (1999). The Act allows for exceptions to this rule, however, by delegating authority to the New Jersey Labor Commissioner to "[a]dopt, issue and promulgate, in the name of the department, such rules and regulations as may be authorized by law . . . ." N.J. Stat. § 34:1A-3(e) (1999). Under the Act, "[s]uch administrative regulations may include among other things, . . . overtime . . . rates . . . ." N.J. Stat. § 34:11-56a16 (1999). "If the commissioner is of the opinion that a substantial number of employees in any occupation or occupations are receiving less than a fair wage, he shall appoint a wage board . . . to report upon the establishment of minimum fair wage rates for employees in such occupation or occupations." N.J. Stat. § 34-11-56a8 (1999). The wage board "may recommend the . . . modification of [the] overtime rate" established under the Wage and Hour Law. N.J. Stat. § 34:11-56a13 (1999).

Until the mid-1990s, the "assumption was that overtime was not required" under New Jersey law for employees of trucking industry employers. 28 N.J.R. 3798(c) (1996). However, at about that time, "recent court cases [ ] raised an issue as to whether overtime was required in New Jersey" for such employees. *Id.* Due to this uncertainty, industry representatives (presumably on behalf of industry employees)

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1. The Wage and Hour Law supplanted New Jersey's Minimum Wage Act, R.S. 34:11-34, *et seq.*, which was originally enacted in 1933. The New Jersey Supreme Court interpreted the Minimum Wage Act as "invest[ing] the Commissioner of Labor with authority to regulate the payment of overtime compensation . . . ." *Lane v. Holderman*, 23 N.J. 304, 313, 129 A.2d 8 (1957).

"petitioned the Department to adopt regulations which would require overtime for these employees." *Id.* Trucking industry employers also requested clarification regarding whether overtime was required. *Id.* Therefore, pursuant to his authority under N.J. Stat. § 34:11-56a8 (1999), the Labor Commissioner appointed a wage board to determine whether trucking industry employees should receive a premium for overtime hours worked: "[t]he Wage Board was convened because the application of the overtime provision could result in the flight of business with the resulting reduction in employment in this industry. Additionally, it could result in a disruption in the 'trip rate' paid to many drivers within this industry." 28 N.J.R. 3798(c).

Once constituted, the wage board gathered and considered a wealth of relevant information on this topic. "[I]n determining the applicable fair rate of pay and reaching [a] conclusion with regard to the effect of the regulation on workers, the Board considered economic data from the region and across the country." 28 N.J.R. 3798(c). For instance, it "carefully considered wage survey information provided by [the] state Office of Labor Research and Analysis," and information regarding "the average wages paid in New Jersey and neighboring states and the country." *Id.* The wage board also considered the law of other states, nothing "that less than five states require any kind of overtime premium for the trucking . . . industry." *Id.* The board further conducted surveys, which "indicate[d] that the industry standard is *not* to pay overtime based on the FLSA exemption." *Id.* (emphasis added). The wage board also considered the fact that the assumption had been that New Jersey law, like federal law and the law of almost every other state, did not require any premium to be paid to employees of trucking industry employers for overtime hours worked. *Id.*

Accordingly, the wage board proposed, in its first report, that there be *no* requirement that such employees be paid a premium for overtime. 28 N.J.R. 3798(c). However, the Commissioner rejected the recommendation and "directed the Wage Board to consider the impact on the lowest paid workers." *Id.* The wage board reconvened and ultimately issued a second report, recommending that employees of trucking industry employers be paid a premium for overtime hours worked, *i.e.*, time-and-one-half the New Jersey minimum wage, or $7.575 per hour. The Labor Commissioner accepted the second report and issued a regulation on August 5, 1996, requiring trucking industry employers like Loomis Fargo to pay employees like Plaintiffs the recommended overtime premium. N.J.A.C. § 12:56-19.3 (1998).

C. The Proceedings Below.

Plaintiffs filed this lawsuit on November 13, 1997, claiming that Defendant Loomis Fargo failed to pay them time-and-a-half *their regular hourly rate* for overtime worked, as generally required by the New Jersey Wage and Hour Law.[2] Prior to any discovery, the parties informed the district court that the material facts of this case were undisputed. The parties stipulated that Loomis Fargo paid Plaintiffs as required by the trucking industry regulation and informed the court that this case turned on a question of law — whether the regulation was valid (App. B, p. 44a). At the parties' request, the district court ordered that no discovery be taken and that the parties file cross motions for summary

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2. Plaintiffs did not bring a claim under the FLSA, admitting that they were exempt from the overtime requirements of that Act pursuant to 29 U.S.C. § 213(b)(1). (Complaint, ¶ 6.)

judgment on the issue of the regulation's validity. The parties filed such motions in late July 1998. Defendant argued that Plaintiffs' claims should be dismissed because they admittedly were paid as required by the regulation (App. B, p. 45a). Plaintiffs, on the other hand, argued that the regulation was invalid under New Jersey law, as it exceeded the authority of the Labor Commissioner under the Wage and Hour Law (App. B, p. 45a).

The district court granted Defendant's motion and denied Plaintiffs' motion on October 15, 1998, upholding the regulation as valid. The court based its ruling on a detailed analysis of the New Jersey Wage and Hour Law, the Labor Commissioner's authority thereunder, and the regulatory history behind the trucking industry regulation (App. B, pp. 45a-56a).

Plaintiffs appealed to the Third Circuit Court of Appeals. The Court of Appeals invited the New Jersey Attorney General to appear as an amicus curiae on behalf of the State of New Jersey on the question of the regulation's validity. The Attorney General submitted a letter brief and participated in oral argument, setting forth the State's position that the regulation was a valid exercise of the Labor Commissioner's authority under the New Jersey Wage and Hour Law. Nevertheless, the Court of Appeals failed to consider the New Jersey Attorney General's opinion. Instead, the appellate court reversed the district court's order and struck down the regulation as invalid under New Jersey law, without ever *mentioning* the State's opinion on this matter of State law. Loomis Fargo filed a timely petition for rehearing and suggestion for rehearing en banc on August 2, 1999, and the Third Circuit denied the petition on August 27, 1999.

The Third Circuit's opinion thus raises the question of when a federal court, called upon to interpret State law, may nevertheless disregard the State's interpretation of its own law.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS IN THE AREA OF FEDERALISM.

Over the years, "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases." *New York v. United States*, 505 U.S. 144, 155 (1992). This is another such case. However, while the Court's recent cases in the area of federalism have primarily considered limitations on the authority of *Congress*, this case raises the question of whether these same federalism principles similarly limit the authority of the *federal courts*.

"Under our Constitution, the Federal Government is one of enumerated powers." *City of Boerne v. Flores*, 521 U.S. __, __, 138 L. Ed. 2d 624, 636 (1997). As James Madison wrote: "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961). Chief Justice Marshall similarly stated in

McCulloch v. Maryland, 4 Wheat 316, 405, 4 L. Ed. 579 (1819) that the federal

> government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

See also Gibbons v. Ogden, 9 Wheat 1, 195, 6 L. Ed. 23 (1824) ("The enumeration presupposes something not enumerated.").

"This has been the Court's consistent understanding: 'The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.' " *New York*, 505 U.S. at 156 (citation omitted). *See* U.S. Const. art X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Alden v. Maine*, 527 U.S. __, 144 L. Ed. 2d 636, 650 (1999) ("Federalism requires that [the federal government] accord States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance."); *Printz v. United States*, 521 U.S. __, __, 138 L. Ed. 2d 914, 940 (1997) ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."). "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' "

New York, 505 U.S. at 156 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

This is a diversity case involving a simple question of state law. It is the command of *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) that a federal court sitting in a diversity case must follow state law. As this Court explained in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945):

> In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.

"The *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990).

The New Jersey Supreme Court has held that, when interpreting New Jersey law, the courts should give "great deference" to the opinion of the New Jersey Attorney General. *Gormley v. Lan*, 438 A.2d 519, 525 (N.J. 1981). Indeed, the New Jersey courts have specifically relied upon the Attorney General's opinion when interpreting the New Jersey Wage and Hour Law. *See, e.g., New Jersey State*

Hotel-Motel Assoc. v. Male, 251 A.2d 466, 468 (N.J. Super. Ct. App. Div. 1969).[3]

In this case, however, after inviting the opinion of the New Jersey Attorney General on the validity of the New Jersey overtime regulation under the Wage and Hour Law, the Third Circuit refused to consider his opinion that the regulation was valid, much less give it the "great deference" to which it would have been entitled in state court. By so doing, the Third Circuit Court of Appeals violated this Court's ruling in *Erie*.

The Court of Appeals similarly exceeded its authority by failing to consider the opinion of the Labor Commissioner that the regulation was a valid exercise of his authority under the New Jersey Wage and Hour Law. 28 N.J.R. § 3798(c). In this regard, the New Jersey Supreme Court has explained that courts should "place[ ] *great weight* on the interpretation of legislation by the administrative agency to whom its enforcement is entrusted." *Medical Soc'y v. Department of Law & Pub. Safety*, 575 A.2d 1348, 1352 (N.J. 1990) (emphasis added). This Court has similarly explained that

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3. Notably, this Court has also deferred to opinions of state attorneys general when such deference is appropriate under state law. *See, e.g., Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 87 n.10 (1975) (explaining that opinions of the Texas Attorney General "are 'entitled to careful consideration by the courts, and [are] quite generally regarded as highly persuasive.' ") (citation omitted). This Court has similarly held that opinions of the *U.S.* Attorney General are entitled to substantial deference on matters of *federal* law. *See Lopez v. Monterey County*, __ U.S. __, 119 S. Ct. 693, 702 (1999) ("[W]e traditionally afford substantial deference to the [United States] Attorney General's interpretation of [federal statutes] . . . .").

"[w]hen a court reviews an agency's construction of the statute which it administers," as in this case, "the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("This Court has long given considerable and in some cases decisive weight to . . . the rulings, interpretations and opinions of the Administrator under this Act . . . .").

The Third Circuit's opinion is admittedly well-written and provides one possible approach to the payment of overtime to trucking industry employees in New Jersey.[4] Yet, the State of New Jersey — as reflected by the opinions of the Attorney General and Labor Commissioner — has taken another, albeit different, sensible approach, which is also based upon a permissible construction of the Wage and Hour

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4. The Third Circuit panel concluded that the Commissioner's reasons for appointing the wage board were inconsistent with the policy behind the Wage and Hour Law, which is "to safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." (App. A at 22a) (quoting N.J. Stat. § 34:11-56a). In so ruling, the panel selectively quoted the Commissioner's reasons, focusing on the Commissioner's concern with the "flight of business," and summarily concluding that the Commissioner appointed the wage board based upon what the panel called "a policy of protecting local trucking businesses from competition." *Id.* After so labeling the Commissioner's motive, the panel concluded that the motive was inconsistent with the policy of the statute. *Id.* at 23a.

Law.[5] Therefore, however sensible the Court of Appeals' approach, that court violated the very essence of federalism by ignoring New Jersey's permissible interpretation of its own law and imposing a federal court's contrary construction of the statute. *See Chevron*, 467 U.S. at 843.

Loomis Fargo's petition should be granted so that this Court may affirm the importance of its holdings on federalism; and so that it may re-affirm that the principles of federalism limit the authority not just of *Congress*, but of the *federal courts*. *See Kohr v. Raybestos-Manhattan, Inc.*, 522 F. Supp. 1070, 1072 (E.D. Pa. 1981) ("Due respect on the part of the federal government, *including the judiciary*, for the sovereignty of the individual states is the essence of federalism.") (emphasis added).

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5. The State's construction is based upon a *full* reading of the Commissioner's explanation for appointing the wage board, considered in its factual context. The Commissioner explained that "[t]he Wage Board was convened because the application of the overtime provision could result in the flight of business *with the resulting reduction in employment in this industry. Additionally, it could result in a disruption in the 'trip rate' paid to many drivers within this industry*." 28 N.J.R. § 3798(c) (emphasis added). Thus, the Commissioner was motivated for concern for *employees*, noting a possible reduction in their employment and disruption of their trip rate. The Commissioner's concern for employees is further reflected by his rejection of the Wage Board's first proposal, under which industry employees would have been entitled to no overtime premium whatsoever. *Id.* Indeed, the employees themselves requested that a regulation be issued, and the regulation the Commissioner adopted is *more stringent* than the FLSA, requiring for the first time that trucking industry employees be paid an overtime premium. Accordingly, the State's interpretation of the Wage and Hour Law as granting the Commissioner the authority to appoint a wage board and adopt the regulation at issue under these circumstances is clearly a permissible one.

CONCLUSION

This case presents a question of exceptional importance — whether the authority of the federal courts, like that of Congress, is limited by principles of federalism. "[T]he Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy." *Lewis v. Casey*, 518 U.S. 343, 386 (1996) (Thomas, J., concurring). Yet, if the opinion below is allowed to stand, a federal court will have refused to consider New Jersey's permissible interpretation of its own law, taking it upon itself to chart state policy regarding the payment of overtime to trucking industry employees. By granting Loomis Fargo's petition for certiorari, however, this Court can correct the Third Circuit's decision, which defies this Court's holdings on matters of federalism. In so doing, this Court can also affirm that federalism principles apply not only to the U.S. Congress, but to the federal courts as well.

Accordingly, Loomis Fargo respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

ROBERT L. THOMPSON
Counsel of Record
DAVID M. VAUGHAN
ELARBEE, THOMPSON & TRAPNELL, LLP
Attorneys for Petitioner
800 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-6700

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JULY 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-6428

JOHN KEELEY; TIMMIE ORANGE;
ARIEL KILPATRICK; CHARLES WERDANN,
on behalf of themselves and all others similarly situated,

Appellants

v.

LOOMIS FARGO & CO.

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civ. No. 97-cv-06207)
District Judge: Honorable Dickinson R. Debevoise

Argued: May 18, 1999

Before: BECKER, *Chief Judge*, RENDELL and ROSENN
Circuit Judges.

(Filed July 19, 1999)

* * *

Appendix A

OPINION OF THE COURT

BECKER, *Chief Judge.*

This appeal in a diversity case arises from an overtime pay dispute between a private employer and a number of its employees. Its resolution turns primarily upon a determination whether the New Jersey Commissioner of Labor exceeded his authority when he promulgated a regulation that excluded certain trucking industry employees, including the plaintiffs here, from New Jersey's statutory overtime pay requirement. The principal aim of this regulation was to avoid job loss that might result if New Jersey trucking industry employers were required — unlike their counterparts in neighboring states — to pay regular overtime wages to their employees. New Jersey's statutory overtime provision, applicable to most private-sector workers in the state, requires employers to pay overtime at a rate of "1-1/2 times [each] employee's regular hourly wage." N.J. Stat. Ann. §34:11-56a4. By contrast, the regulation at issue here requires only that trucking industry employers pay their employees "an overtime rate not less than one and one-half times the [state] minimum wage." N.J. Admin. Code §12:56-19.3. Because most trucking industry employees, including the plaintiffs here (with one minor exception), earn wages exceeding "one and one-half times the [state] minimum wage," the regulation's purported requirement that employers pay an overtime premium is rendered superfluous.

Our reading of New Jersey's Wage and Hour Law, and of New Jersey precedent in this area and in the administrative law field, leads us to the conclusion that the Commissioner

exceeded his authority in enacting this regulation. The text of the statute plainly limits the Commissioner to promulgating wage orders only in those cases in which "a substantial number of employees in any occupation or occupations are receiving *less than a fair wage.*" N.J. Stat. Ann. §34:11-56a8 (emphasis added). The Commissioner made no such finding in this case, and in fact, implicitly justified adoption of the challenged regulation on the opposite ground, i.e., that the covered employees' wages were too high, thereby threatening New Jersey's trucking industry. Additionally, New Jersey's legislature has explicitly declared the policy of the Wage and Hour Law to be protecting employees from unfair wages and excessive hours, and the state's courts have repeatedly affirmed the protective nature of the statute. The trucking industry regulation issued by the Commissioner contravenes not only the plain language of the statute, but also this clearly expressed policy.

Finally, New Jersey precedent in both the Wage and Hour Law context and in the broader field of administrative law supports our conclusion that the Commissioner's promulgation of the challenged regulation exceeded his authority. Because we find that the Commissioner exceeded his authority in promulgating this regulation, we hold that the defendant Loomis Fargo may not assert the regulation as a defense to plaintiffs' claims for unpaid overtime wages.

We also conclude that the New Jersey good-faith defense for failure to pay overtime wages may apply to the period at issue here. The New Jersey good-faith defense requires both that the employer acted in good faith and that it relied on a

written regulation, administrative practice, or enforcement policy of the relevant state agency. For the period prior to the enactment of the challenged regulation, there is no evidence in this record that the defendant relied on one of the enumerated sources in failing to pay the statutorily required overtime. We will therefore remand to the District Court for a determination whether the employer acted on the basis of an administrative practice or enforcement policy prior to the regulation's enactment. Because the New Jersey statute requires that the employer's good faith be based on an action or policy of a state agency, the employer may not rely on remand, as it did originally, on such sources as industry practice or union acquiescence to meet its burden to prove the good-faith defense for the pre-regulation period.

After the regulation was enacted, the employer would seem to have relied on that regulation to justify its failure to pay the statutory overtime rate. However, the record is silent on the basis for the employer's refusal to pay the statutory rate, and the District Court did not reach the issue whether the defendant acted with the requisite good faith in not paying the statutory rate. There may conceivably be some other explanation for the refusal other than good-faith reliance on the regulation, and hence we will leave for the District Court to determine in the first instance, following remand, whether the employer acted with good faith after the Commissioner of Labor promulgated the regulation at issue.

I. Procedural History

Since 1966, New Jersey's Wage and Hour Law, N.J. Stat. Ann. §§34:11-56a to -56a30, has required most employers

in the state to pay employees 1-1/2 times their regular hourly wage rate for work in excess of forty hours per week.[1] Plaintiffs are four current or former employees of defendant Loomis Fargo (the successor to Wells Fargo Armored Service Corp.), which, for all relevant time periods, has failed to pay plaintiffs overtime pay according to the Wage and Hour Law. On November 13, 1997, plaintiffs filed a putative class action in New Jersey state court on behalf of themselves and similarly situated Loomis Fargo employees, seeking damages and equitable relief for Loomis Fargo's failure to pay overtime.[2] Loomis Fargo, a non New Jersey citizen, removed the case to federal court.

Initially, Loomis Fargo moved to have the case dismissed on preemption grounds, arguing that the FLSA and the Federal Motor Carrier Act preempted New Jersey's minimum wage and overtime law. The District Court denied this motion. *See Keeley v. Loomis Fargo & Co.*, 11 F. Supp. 2d 517, 521 (D.N.J. 1998). Less than a month later, the Magistrate Judge assigned to the case ordered the parties to file cross-motions for summary judgment on the basis of

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1. The Fair Labor Standards Act ("FLSA") similarly requires the payment of time-and-a-half for overtime work. *See* 29 U.S.C. §207(a)(1) (1994). However, there is no dispute that the plaintiffs are exempted from the overtime requirements of the FLSA, *see id.* §213(b)(1) (1994 & Supp. II 1996), and we therefore confine our discussion to the New Jersey overtime law.

2. As the New Jersey Wage and Hour Law has a two-year statute of limitations, *see* N.J. Stat. Ann. §34:11-56a25.1 (1988), plaintiffs' claims for past unpaid wages are limited to the period beginning November 13, 1995.

another defense put forth by Loomis Fargo, i.e., that its employees were exempted from the overtime law's requirements by a regulation promulgated by the New Jersey Commissioner of Labor in 1996. *See* J.A. at 51. The plaintiffs contended that the regulation exempting them from the overtime provision's coverage was invalid, as the Commissioner had no authority to enact it, and that they were therefore entitled to 1-1/2 times their regular hourly wages for any overtime work. The District Court held that the regulation was valid, and that for the period prior to the effective date of the regulation the defendant had acted with a good-faith belief that it need not pay overtime, thereby absolving it of any liability. *See Keeley v. Loomis Fargo & Co.*, 42 F. Supp. 2d 442, 451-52 (D.N.J. 1998).

The District Court had jurisdiction over this diversity case under 28 U.S.C. §1332, while we have jurisdiction to hear the appeal of the District Court's final order granting summary judgment to defendant under 28 U.S.C. §1291. Our review of the District Court's order is plenary. We must apply the same standard that the District Court was required to apply, "construing all evidence and resolving all doubts raised by affidavits, depositions, answers to interrogatories, and admissions on file in favor of the non-moving party." *Iberia Foods Corp. v. Romeo*, 150 F.3d 298, 302 (3d Cir. 1998). However, in resolving the primary disputed issue in this case — the validity of the state regulation excluding plaintiffs from the overtime law's coverage — we are faced with a purely legal issue. To the extent that factual issues remain regarding Loomis Fargo's good-faith defense, we will remand for the District Court's determination of these issues in the first instance.

Appendix A

II. New Jersey Minimum Wage and Overtime Provisions

A. *Statutory Provisions*

New Jersey's overtime pay statute provides, in relevant part:

> Every employer shall pay to each of his employees wages at a rate . . . 1-1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week, except this overtime rate shall not include any individual employed in a bona fide executive, administrative, or professional capacity or, if an applicable wage order has been issued by the commissioner under [§34:11-56a16], not less than the wages prescribed in said order. . . .
>
> The provisions of this section for the payment to an employee of not less than 1-1/2 times such employee's regular hourly rate for each hour of working time in excess of 40 hours in any week shall not apply to employees engaged to labor on a farm or employed in a hotel or to an employee of a common carrier of passengers by motor bus or to a limousine driver who is an employee of an employer engaged in the business of operating limousines or to employees engaged in labor relative to the raising or care of livestock.

N.J. Stat. Ann. §34:11-56a4 (1988 & Supp. 1999).

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The New Jersey legislature, in establishing this overtime pay requirement — and the related minimum-wage requirement — explicitly outlined the policy behind its enactment: "[T]o safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." *Id.* §34:11-56a (1988).

Another provision of the law provides for appointment of wage boards by the Commissioner of Labor, which boards may recommend to the Commissioner the adoption of regulations governing minimum wages and overtime. The key provision provides, *in full*:

> If the commissioner is of the opinion that a substantial number of employees in any occupation or occupations are receiving less than a fair wage, he shall appoint a wage board as provided in [§34:11-56a9] to report upon the establishment of minimum fair wage rates for employees in such occupation or occupations.

Id. §34:11-56a8. Section 34:11-56a9 outlines the procedure by which wage board members are appointed and establishes the number and nature (i.e., employer representatives, employee representatives, etc.) of such members. Upon a majority vote of a wage board's members, the board may "recommend minimum fair wage rates" and the "establishment or modification of the number of hours per week after which the overtime rate established in [§34:11-56a4] shall apply and . . . the establishment or modification of said overtime rate." *Id.* §34:11-56a13.

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Following issuance of a wage board's report to the Commissioner, notice and a public hearing must be held. *See id.* §34:11-56a15. Within ten days after the hearing, the Commissioner must either approve or disapprove the report:

> If the report is approved, the commissioner shall make a wage order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the wage board and which shall include such proposed administrative regulations as the commissioner may deem appropriate to supplement the report of the wage board and to safeguard the minimum fair wage standards established. Such administrative regulations may include among other things, . . . overtime or part-time rates . . . .

Id. §34:11-56a16. In 1972, a provision was added to the Wage and Hour Law that provides, in full, that "[t]he provisions of this act shall be applicable to wages covered by wage orders issued pursuant to [§34:11-56a16]." *Id.* §34:11-56a4.2.

B. *The Regulations*

Pursuant to the foregoing statutory provisions, the Commissioner has promulgated regulations that govern wages and hours for workers in a number of occupations. The regulation at issue in this case provides:

> Every trucking industry employer shall pay to all drivers, helpers, loaders and mechanics for

> whom the Secretary of Transportation may prescribe maximum hours of work for the safe operation of vehicles pursuant to 49 U.S.C. §31502(b) an overtime rate not less than one and one-half times the minimum wage required pursuant to N.J.S.A. 34:11-56a4 and N.J.A.C. 12:56-3.1.

N.J. Admin. Code §12:56-19.3 (1998). This regulation was proposed by the Commissioner on March 18, 1996, and adopted on July 15, 1996, with an effective date of August 5, 1996. Defendant Loomis Fargo is a "trucking industry employer," and the plaintiffs are all "drivers, helpers, loaders [or] mechanics" covered by the reference to 49 U.S.C. §31502(b). Therefore, there is no question that the regulation applies to the present dispute and that, if it is valid, it justifies defendant's payment of overtime wages that are less than the statutory minimum, but that are consistent with the regulation.

The commissioner has promulgated a number of other regulations that govern various categories of employees and employers. For example, one regulation exempts six categories of workers from the minimum wage laws.[3] *See* N.J. Admin. Code §12:56-3.2 (1995). However, each of these categories is already specifically exempted under the

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3. The exempted categories include certain full-time college students, outside sales persons, motor vehicle sales persons, part-time home-based child care workers, certain minors, and employees at "summer camps, conferences and retreats operated by any nonprofit or religious corporation or association during the months of June, July, August and September."

statutory minimum wage provision. *See* N.J. Stat. Ann. §§34:11-56a4, -56a4.1. Other regulations in fact extend the statutory overtime provisions, with certain modifications, to employees who are otherwise exempted (by explicit legislative mandate) from the statute's coverage. *See* N.J. Admin. Code §§12:56-11.3, -13.3. Additional regulations, covering food service employees, air carrier employees, and skilled mechanics, provide that these employees must be paid overtime (as defined in the statute), with certain adjustments relevant to their industries.[4]

None of the foregoing regulations exempt employees from the statute's overtime or minimum wage provisions when such an exemption does not appear in the statute itself. In fact, from the parties' submissions and our own research, it appears that the only categories of employees exempted from the law's overtime requirements by regulation, but not also exempted by statute, are seasonal amusement employees and trucking industry employees. The defendant additionally cites the skilled mechanic regulation as evidence that the Commissioner has the authority to exempt groups of

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4. *See* N.J. Admin. Code §12:56-14.3(a)(3) (1995) (providing, in the case of food industry employees, that "[f]ood and lodging supplied to employees shall not be included in wages for those hours worked in excess of 40 hours per week"); *id.* §12:56-15.3(a) (allowing the use of compensatory time off instead of overtime pay for air carrier employees, in certain circumstances); *id.* §12:56-20.3(a) (1998) (providing that skilled mechanics employed by auto dealers are exempt from the overtime provisions only if they are paid on a flat or incentive-rate basis *and* are "guaranteed a basic contractual hourly rate [that] . . . must include payment of time and one-half of the hourly rate for all hours actually worked in excess of 40 hours per week").

employees not explicitly exempted by the statute. *See* Appellee's Br. at 14 & n.10. However, it fails to note that the skilled mechanic regulation effectively requires that these employees be paid at the statutory overtime rate. *See* N.J. Admin. Code §12:56-20.3(a) (1998) (providing that skilled mechanics are "guaranteed a basic contractual hourly rate [that] . . . must include payment of time and one-half of the hourly rate for all hours actually worked in excess of 40 hours per week").

Seasonal amusement employees are exempted from the overtime provisions (but not the minimum wage provisions) altogether. *See id.* §12:56-12.3 (1995).[5] Trucking industry employees — the group at issue in this case — are partially exempted, in that they are entitled to overtime pay of at least 1-1/2 times the minimum wage, rather than 1-1/2 times their own hourly wage rate. *See id.* §12:56-19.3 (1998). As noted above, however, because most trucking industry employees receive regular wages that exceed 1-1/2 times the state minimum wage, the trucking industry regulation effectively exempts these employees from any overtime requirement and prevents them from receiving an overtime premium.

III. Validity of the Trucking Industry Regulation

If the regulation at issue here is valid, it would provide a complete defense to defendant's failure to pay overtime to

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5. The issue whether the seasonal amusement employee regulation is valid is not before us. We therefore draw no inference from the Commissioner's promulgation of this regulation exempting apparently otherwise-covered employees from the statutory overtime provision.

its employees for the period following its effective date of August 5, 1996. (We discuss below defendant's possible good-faith defense for its failure to pay overtime before — and after — the regulation's enactment.) Therefore, our primary task is to determine whether the trucking industry regulation was validly promulgated by the Commissioner under the terms of the New Jersey Wage and Hour Law.

A. *New Jersey Case Law*

Decisions of New Jersey's courts involving both the Wage and Hour Law and other administrative regimes are instructive in our determination whether the Commissioner exceeded his authority in the present case. In the wage law context, the Appellate Division of the New Jersey Superior Court held in a pre-1966 case that the Commissioner of Labor exceeded his authority in issuing a wage order setting minimum wages for certain hotel employees, when the statute at that time explicitly excluded hotel employees from its coverage. *See Hotel Suburban Sys., Inc. v. Holderman*, 125 A.2d 908, 912 (N.J. Super. Ct. App. Div. 1956). Unlike the current Wage and Hour Law, the pre-1966 statute did not establish minimum wages or maximum hours, but conferred authority on the Commissioner to promulgate wage and hour requirements on an industry-by-industry basis, through the issuing of wage orders. However, the statute explicitly excluded certain occupations from the Commissioner's authority.

In *Hotel Suburban*, the court noted that the Commissioner's exercise of his authority "is of necessity restrained by the declared policy and spirit of the statute and

the criteria and standards therein laid down," and "the rules and regulations and administrative action cannot subvert or enlarge upon the statutory policy or . . . . deviate from the principle and policy of the statute." *Id.* at 911 (quoting *Abelson's Inc. v. New Jersey State Bd. of Optometrists*, 75 A.2d 867, 872 (N.J. 1950)). Further, the court stated that the Commissioner could make regulations "consistent with, but limited by, the provisions of the statute," and when the statute was "clear and unambiguous," the Commissioner could not amend, alter, enlarge, or limit "the terms of the legislative enactment." *Id.* The court concluded by noting that, even conceding the validity of the Commissioner's policy arguments for including the relevant employees under the minimum wage act, "the authority to classify and exempt lies with the Legislature; it is not an administrative or judicial function." *Id.* at 913-14; *see also Silverman v. Berkson*, 661 A.2d 1266, 1268 (N.J. 1995) ("The first question in this case is one of agency authority. Government agencies have only those powers the Legislature confers on them.").

Following passage of the 1966 Act, the Appellate Division held that the Commissioner could issue a wage order for occupations excepted from the statute's new minimum wage provisions:

> Under N.J.S.A. 34:11-56a13 the wage board may recommend the "establishment" of an overtime rate in the particular occupation for which the wage board was appointed. Since overtime is provided for under N.J.S.A. 34:11-56a4 as to all occupations, save those specifically excepted, manifestly a wage board recommendation

> for the "establishment" of an overtime rate would have to be in one of the occupations excepted from the overtime provisions of N.J.S.A. 34:11-56a4.

New Jersey State Hotel-Motel Ass'n v. Male, 251 A.2d 466, 467 (N.J. Super. Ct. App. Div. 1969).

New Jersey courts have also frequently discussed the scope of administrative agencies' authority in contexts other than the Wage and Hour Law. In *Medical Society v. New Jersey Department of Law & Public Safety*, 575 A.2d 1348 (N.J. 1990), plaintiffs challenged a regulation promulgated by the State Board of Physical Therapy. Before evaluating that challenge, the state supreme court explained its scope of review:

> An agency rule or regulation is presumptively valid, and anyone challenging such a rule or regulation has the burden of proving its invalidity. This presumption of validity attaches if the regulation is within the authority delegated to the agency and is not on its face beyond the agency's power. An administrative regulation, however, cannot alter the terms of a statute or frustrate the legislative policy. This Court, nonetheless, "places great weight on the interpretation of legislation by the administrative agency to whom its enforcement is entrusted."

Id. at 1352 (citations omitted).

The court noted that its "task is to discern the extent to which the Legislature has delegated authority" to the

administrative agency, looking "initially [at] the terms of the Act." *Id.* Further, the court held that, in discerning legislative intent, it "should try to give effect to every word of the statute, and should not assume that the Legislature used meaningless language." *Id.* at 1353. The court also looked to legislative history, particularly differences between the current statute and its predecessor. *See id.* at 1353-54. In the end, it found the regulation at issue valid. *See id.* at 1355.

The Appellate Division has also emphasized the relevance of a statute's underlying policy, particularly one declared explicitly by the legislature:

> In deciding whether a particular regulation is statutorily authorized, a court "may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives." . . . Furthermore, declarations of public policy in enabling legislation can serve as sources of statutory authorization for regulations aimed at pursuing that policy.

E.I. du Pont de Nemours & Co. v. New Jersey Dep't of Envtl. Protection & Energy, 661 A.2d 1314, 1319 (N.J. Super. Ct. App. Div. 1995) (quoting *New Jersey Guild of Hearing Aid Dispensers v. Long*, 384 A.2d 795, 804 (N.J. 1978)).

Finally, the New Jersey Supreme Court recently reiterated that an agency regulation must be "within the fair contemplation of the delegation of the enabling statute." *New*

Jersey State League of Municipalities v. Department of Community Affairs, 729 A.2d 21, 27 (N.J. 1999) (internal quotation omitted) ["*State League*"]. The court went on to note, as it did in *Medical Society*, that a determination whether the regulation is within the agency's delegated authority must begin with " 'the statute's plain meaning,' " followed, if necessary, by analysis of "the legislative intent underlying the statute." *State League*, 729 A.2d at 28 (citation omitted).

In sum, as the excerpt above from *Medical Society* makes clear, an administrative regulation "cannot alter the terms of a statute or frustrate the legislative policy." 575 A.2d at 1352. In evaluating the regulation affecting trucking industry employees, we must look at whether it is consistent with the terms of the Wage and Hour Law, and compare the regulation to the legislative policy behind the law. We add only that New Jersey's law in this area is entirely mainstream, reflecting fundamental principles of statutory construction and administrative law.

B. *The Trucking Industry Regulation*

1. Text of the Statute

New Jersey's Wage and Hour Law provides: "*Every employer* shall pay to each of his employees" the overtime rate of 1-1/2 times the employee's own wage rate. N.J. Stat. Ann. §34:11-56a4 (emphasis added). The plain meaning of "every employer" would appear to include trucking industry employers. *See State v. Kennedy*, 705 A.2d 757, 760 (N.J. 1998) (finding that the "plain meaning" of a statute requiring

restitution by "every person who violates this section" was that *every* person who violates that law, including one who pleads guilty, must pay restitution).

Two groups are explicitly exempted from the requirement that "every employer" pay the statutory overtime rate. First, certain *types* of workers (executive, administrative, and professional) are excluded from the overtime provisions. Second, employees in certain *industries* are exempted (farm workers, hotel employees, etc.). Under the well-established principle of statutory construction, *expressio unius est exclusio alterius*, the legislature's explicit expression of one thing — here, certain exceptions to the overtime requirement — indicates its intention to exclude other exceptions from the broad coverage of the overtime requirement. *See Township of Pennsauken v. Schad*, 704 A.2d 1337, 1339 (N.J. Super. Ct. App. Div.) (invoking *expressio unius* maxim to interpret coverage of a zoning ordinance), *cert. granted*, 718 A.2d 1210 (N.J. 1998), *and cert. granted*, 718 A.2d 1211 (N.J. 1998). We note that the expressed exceptions in the statute plainly do not include the one at issue here, the trucking industry, evincing the legislature's intent to include this industry within the statute's overtime coverage. While the *expressio unius* maxim "can never override clear and contrary evidences of [legislative] intent," *Abdullah v. American Airlines, Inc.*, Nos. 98-7055, -7056, 1999 WL 415525, at *10 (3d Cir. June 23, 1999) (internal quotation omitted), the inference we draw from the maxim in this case is entirely consistent with the legislature's intent that we discern from a plain reading of the statutory text and the manifest policy behind the Wage and Hour Law.

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In addition to the explicit exceptions in the law — which do not include trucking industry employees — the legislature has delegated authority to the Commissioner to constitute wage boards and to adopt such boards' recommendations regarding wages and overtime. Once again, however, our examination of the plain language of the statutory provision conferring this authority militates against the conclusion that the Commissioner may exempt entire groups of employees (or employers) from the statutory overtime requirements.[6] The relevant provision grants the Commissioner authority to commence the wage order process by appointing a wage board (only) "[i]f the commissioner is of the opinion that a substantial number of employees in any occupation or occupations are receiving *less than a fair wage*." N.J. Stat. Ann. §34:11-56a8 (emphasis added); *see also id.* §34:11-56a7 ("The commissioner shall have the power, on his own motion, and it shall be his duty upon the petition of 50 or more residents of the State, to cause the director to investigate any occupation to ascertain whether a substantial number of employees are receiving less than a fair wage.").

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6. While the regulation at issue here requires trucking industry employers to pay at least 1-1/2 times the statutory minimum wage to their employees (rather than 1-1/2 times the employees' own wage rates) for overtime hours, the record discloses that virtually all trucking industry employees have wage rates that exceed 1-1/2 times the statutory minimum wage. The overtime requirement in the trucking industry regulation is thus not a mere modification of the statutory overtime rate, but is largely a nullification of that statutory requirement. It is for this reason that we speak in terms of trucking industry employers being "exempted" or "excluded" from the overtime requirements by the regulation, as their employees are, in practical terms, paid the same wage rate for their overtime hours as they are for their regular hours of work.

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Section 34:11-56a8 is the only provision cited by the defendant, and the only one we believe exists, that grants the Commissioner the authority to appoint a wage board, which is a necessary prerequisite to the issuing of a wage order. *See id.* §34:11-56a16. In this case, the Commissioner noted that the wage board was appointed because of uncertainty regarding whether trucking industry employees were covered by the overtime provision and in order to ensure that New Jersey trucking companies remained competitive with out-of-state companies that were not covered by their own states' overtime requirements. *See* 28 N.J. Reg. 3798, 3799 (1996). The plain language of section 34:11-56a8, however, limits the Commissioner's authority to appointing a wage board when, despite the general protections of the wage and overtime law, a substantial number of employees in an industry are *underpaid*, a condition that concededly is not present here.[7]

In short, we find that the text of the New Jersey Wage and Hour Law plainly covers "every employer" except those explicitly exempted by the legislature. Further, the

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7. In its appellate brief, the defendant appears to admit as much: "Thus, if there is a question as to whether a substantial number of employees in a particular occupation are receiving *less than a fair wage*, the Commissioner is empowered in several ways (and indeed, it may well be his duty) to investigate the question." Appellee's Br. at 15 n.12 (emphasis added). While we believe this is an accurate statement of the Commissioner's authority under the law, as explained in the text, we reject defendant's argument that once a wage board is validly appointed because of evidence that employees are being paid less than a fair wage, the wage board can recommend that wages for these employees be *lowered*.

Commissioner's authority to appoint wage boards, whose reports might lead to the adoption of wage orders, is clearly limited to those situations in which employees in the relevant industry are being underpaid.

Before turning to an analysis of the policy underlying the statute, we note that section 34:11-56a4.2 was added to the statute in 1972, providing plainly and without exception that "[t]he provisions of [the Wage and Hour Law] shall be applicable to wages covered by wage orders." N.J. Stat. Ann. §34:11-56a4.2. This clear and unequivocal statutory command would be overridden if the Commissioner could issue a wage order, such as the one challenged here, that was inconsistent with a provision of the act, such as the minimum wage or overtime provisions. If the statutory overtime provision is applicable to the trucking industry wage order, which would appear to be compelled by section 34:11-56a4.2, that wage order cannot reduce the overtime pay requirements to less than 1-1/2 times a worker's regular hourly wage.

2. Policy of the Statute

As noted above, New Jersey courts have held that the Commissioner's authority to promulgate wage orders "is of necessity restrained by the declared policy and spirit of the statute," and "the rules and regulations and administrative action cannot subvert or enlarge upon the statutory policy or . . . . deviate from the principle and policy of the statute." *Hotel Suburban*, 125 A.2d at 911 (internal quotation omitted). Further, "[a]n administrative regulation . . . [cannot] frustrate the legislative policy." *Medical Society*, 575 A.2d

at 1352. Therefore, we must examine the wage order and the justification given by the Commissioner for its promulgation to determine whether the order is consistent with the declared policy of the Wage and Hour Law.

The primary rationale asserted by the Commissioner for establishing a wage board to examine the trucking industry and for adopting the board's recommendation was that "the application of the [statutory] overtime provision could result in the flight of business with the resulting reduction in employment in this industry." 28 N.J. Reg. at 3799. By contrast, the declared policy of the Wage and Hour Law is "to safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." N.J. Stat. Ann. §34:11 56a. In a number of cases, New Jersey courts have noted that the Wage and Hour Law "is social legislation designed to correct abuses in employment," *Male*, 251 A.2d at 467, and that "[t]he humanitarian and remedial nature of this legislation requires that any exemption therefrom be narrowly construed." *Yellow Cab Co. v. State*, 312 A.2d 870, 873 (N.J. Super. Ct. App. Div. 1973).

We think it beyond dispute that a policy of protecting local trucking businesses from competition (even if this will redound to the benefit of these businesses' employees) is fundamentally different from the stated legislative policy of protecting workers from unfair wage levels "detrimental to their health, efficiency and well-being." When the declared

policy behind a statute is to protect workers from abusive practices regarding low wages and excessive hours, a regulation excluding a group of workers from this protective legislation's coverage, under the guise of keeping a local industry competitive, "frustrate[s] the legislative policy," *Medical Society*, 575 A.2d at 1352, and usurps "the authority to classify and exempt[, which] lies with the Legislature," *Hotel Suburban*, 125 A.2d at 914.

While we believe that the plain language of the statute and its clearly stated policy inexorably lead to the conclusion that the Commissioner does not have the authority to exempt a group of employees, not otherwise exempted by the statute, from the law's minimum wage or overtime requirements, we also find support for our conclusion in the major changes made to the law in 1966. As noted above, under the pre-1966 law, no minimum wages or overtime pay requirements existed in the statute itself, while the Commissioner was explicitly authorized to promulgate such protective devices for certain groups of workers. In 1966, the law was fundamentally changed, and minimum wage and overtime pay requirements were established for all workers (with certain enumerated exceptions) in the statute. Under the new law, the Commissioner's authority changed substantially, from promulgating wage orders for any group of workers not explicitly excluded from that authority, *cf. Hotel Suburban*, 125 A.2d at 912, to issuing wage orders that bring excluded employees under the law's coverage, *cf. Male*, 251 A.2d at 467. There is, however, no indication that the legislature intended, in making this change, to confer on the Commissioner an entirely different authority to exempt

employees who would otherwise be included within the new statute's broad coverage.[8]

3. Summary

In sum, we find that the plain language of the New Jersey Wage and Hour Law requires, with certain enumerated exceptions, that "every employer" in the state pay its employees overtime wages at a rate of 1-1/2 times each employee's regular wage rate. We also find that the plain language of the section granting the Commissioner of Labor authority to form a wage board and to subsequently issue a wage order confers such authority only when the Commissioner finds that "a substantial number of employees in any occupation or occupations are receiving less than a fair wage," something that the Commissioner unquestionably did not find in the present case. Finally, the policy of the Wage and Hour Law, declared by New Jersey's legislature and reiterated by the state's courts, supports our reading of the statute's text and our conclusion that the Commissioner

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8. In a similar vein, the defendant refers us to other states in which wage orders have been issued by administrative agencies exempting truck drivers from overtime requirements, as support for its argument that the New Jersey Commissioner had authority to do so as well. In these states, however, the statutory provisions are more like the pre-1966 law in New Jersey in that no general wage or hour requirements exist in the statutes and broad discretion is vested in the administrative agencies to promulgate rules or regulations regarding wages and hours. *See, e.g.*, N.D. Cent. Code §34-06-03 (1997) ("The commissioner . . . may ascertain and prescribe: 1. Standards of hours of employment for employees and what are unreasonably long hours . . . [and] 3. Standards of minimum wages for employees in any occupation in this state.").

may not exempt a category of employees from the statute's coverage when the legislature has not done so itself or expressly authorized the Commissioner to do so. This is clearly not a case in which the plain reading of a statute conflicts with its underlying rationale. *Cf. State League*, 729 A.2d at 29 (rejecting a literal reading of a statute that "would render the Act virtually meaningless").

We therefore conclude that the Commissioner had no authority to promulgate the regulation challenged by plaintiffs, and hence defendant may not rely on the regulation as a defense to plaintiffs' claims for unpaid overtime wages that they are due under New Jersey's Wage and Hour Law. We will accordingly reverse the District Court's judgment in favor of defendant Loomis Fargo for the period following the regulation's promulgation.

IV. The Good-Faith Defense

Although we conclude that defendant may not rely on the trucking industry regulation to defend against plaintiffs' claims for unpaid overtime wages, New Jersey's Wage and Hour Law contains a good-faith defense that may apply to this case. Because the District Court held that the regulation was valid, it did not reach the issue of defendant's good-faith defense after the regulation became effective. However, it found that the good-faith defense did apply to the period before the regulation's adoption. We will remand for the District Court to revisit both of these issues because, as we discuss below, we seriously question whether defendant meets the requirements for the good-faith defense prior to the regulation's adoption, and we believe the District Court

should have the opportunity in the first instance to analyze the good-faith defense's applicability after enactment of the regulation.

A. *New Jersey's Good-Faith Defense*

1. The Statutory Provision

The statutory provision that permits a good-faith defense to a violation of the overtime statute provides as follows:

> [N]o employer shall be subject to any liability or punishment for or on account of . . . the failure of the employer to pay minimum wages or overtime compensation under this act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner of the Department of Labor and Industry or the Director of the Wage and Hour Bureau, or any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged. Such a defense, if established, shall be a complete bar to the action or proceeding, notwithstanding, that after such act or omission, such administrative regulation, [etc.] . . . is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

N.J. Stat. Ann. §34:11-56a25.2 (1988).

The case law on New Jersey's good-faith defense is sparse. The one case relied on by the District Court, a Law Division case, appeared to ignore the requirement that good faith be based on a written regulation, order, etc., and found that the defendant's reliance on unrelated statutes and industry practice constituted good faith. *See State v. Frech Funeral Home*, 448 A.2d 1037, 1041-43 (N.J. Super. Ct. Law Div. 1982).[9]

2. Analogous Federal Statutes

The federal wage and overtime statutes also include a good-faith defense, and we believe that our precedents interpreting the federal good-faith law are helpful in our task of interpreting the state provision. The federal law includes two good-faith provisions.[10] One of these is identical in all

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9. The District Court inadvertently cited *Frech* as a New Jersey Supreme Court case. *See Keeley*, 42 F. Supp. 2d at 452. Were *Frech* actually a state supreme court case, we would obviously adhere to its interpretation of the state good-faith defense, even though the court appeared to ignore a requirement of that defense. However, as *Frech* is actually a trial court decision, it is at most persuasive but nonbinding authority and we look to the plain language of the statute and our own interpretation of the good-faith defense in predicting how the state supreme court would apply the defense to the facts of this case.

10. The two good-faith defenses offer different protections. The first, 29 U.S.C. §259, provides a complete defense to an action for unpaid wages, while the second, *id.* §260, gives a court discretion to award less than the statutory amount of liquidated damages, but still requires the defendant to pay compensatory damages for unpaid wages.

material respects to the New Jersey good-faith statute. *See* 29 U.S.C. §259(a) (1994); *cf. Dole v. Odd Fellows Home Endowment Bd.*, 912 F.2d 689, 696 (4th Cir. 1990) (noting that the good-faith defense in §259 requires a "written regulation, order, ruling, approval, or interpretation that could have been relied on"). The second federal provision is less strict,[11] requiring only that "the employer [show] to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act." 29 U.S.C. §260 (1994).

While §260 requires simply good faith and "reasonable grounds," as opposed to the New Jersey law's requirement of reliance on an administrative regulation, order, practice, or policy, cases involving §260 are still informative for their interpretation of the "good faith" requirement. For example, in *Williams v. Tri-County Growers, Inc.*, this court held:

> The fact that an employer has broken the law for a long time without complaints from employees does not demonstrate the requisite good faith required by the statute. . . . The employer must affirmatively establish that he acted in good faith by attempting to ascertain the Act's requirements.

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11. *Cf.* 29 C.F.R. §790.17(i) n.110 (1998) (noting that the fact that an employer has no defense under §259 would not preclude a court from finding that the employer had met the requirements for the defense in §260).

747 F.2d 121, 129 (3d Cir. 1984). Under *Williams*, Loomis Fargo's longstanding practice of not paying overtime and its union's apparent acquiescence in this practice are insufficient to establish good faith — even leaving aside the existence (or lack thereof) of a regulation, order, practice, or policy on which defendant relied.

More recently, we discussed the good-faith defense in §260 in *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3d Cir. 1991). In *Martin*, we held that the district court erred in finding that the employer had proved the good-faith defense, citing three factors in particular. First, reiterating the holding in *Williams*, we held that the employer's "failure to inquire into the Act's overtime pay requirements before [the agency's investigation] precludes a determination that the company's subjective good faith was reasonable." *Id.* at 909. Second, we held that "the employer's adherence to customary and widespread industry practices that violate the Act's overtime pay provisions is not evidence of an objectively reasonable good faith violation." *Id.* at 910. Finally, we rejected the district court's contention that an employer could violate overtime requirements as a " 'reasonable and necessary' competitive response[ ] to the 'market for qualified employees.' " *Id.* (quoting district court). We noted that "[t]his reasoning tends improperly to favor companies in industries where economic conditions make violations of the Act most attractive or pervasive." *Id.*

Williams and *Martin*, therefore, provide that reasonable good faith is not shown when an employer does not inquire about the law's requirements, simply follows an industry trend of not complying with the law, or violates the law in

order to remain competitive. Although we will not assume that New Jersey's courts would adopt this federal jurisprudence unaltered, we note again that these cases involved the federal good-faith defense with the lower standard, while the language of the New Jersey statute is virtually identical to that of the stricter of the two federal good-faith provisions. The federal jurisprudence also seems eminently sensible. Therefore, these cases likely present the *minimum* standard that a New Jersey employer must meet in order to enjoy the protections of that state's good-faith defense to a failure to pay overtime.

3. Federal Regulations

Although federal wage and hour regulations obviously do not apply to New Jersey's wage law, such regulations contain explanations of each term in §259 (each of which terms also appears in the New Jersey good-faith provision), and may be helpful in interpreting the New Jersey good-faith defense. The regulations note that "the employer's 'good faith' is not to be determined merely from the actual state of his mind." 29 C.F.R. §790.15(a) (1998). Rather, " 'good faith' also depends upon an objective test — whether the employer . . . acted as a reasonably prudent man would have acted under the same or similar circumstances." *Id.*

The regulations also state, as we did in *Williams* and *Martin*, that an employer has an affirmative duty to inquire about uncertain coverage issues, such as might arise if conflicting court decisions exist. *See id.* §790.15(b); *id.* §790.15(d) n.99 ("It is not intended that this defense shall apply where an employer had knowledge of conflicting rules

and chose to act in accordance with the one most favorable to him." (quoting 93 Cong. Rec. 4390 (1947) (statement of Rep. Walter))). Such uncertainty appears to have existed here, before the state regulation was promulgated. *See* 28 N.J. Reg. at 3799 ("[R]ecent court cases have raised an issue as to whether overtime was required in New Jersey.").

Finally, the regulations make clear that an employer may not assert the good-faith defense on the basis of the relevant agency's non-action:

> A failure to act or a failure to reply to an inquiry on the part of an administrative agency is not a "regulation, order, ruling, approval, or interpretation" within the meaning of [§259]. . . .
>
> . . . .
>
> . . . [While t]his should not be construed as meaning that an agency may not have administrative practices or policies to refrain from taking certain action as well as practices or policies contemplating positive acts of some kind . . . , there must be evidence of [the practice or policy's] adoption by the agency through some affirmative action establishing it as the practice or policy of the agency.

29 C.F.R. §§790.17(f), 790.18(h).

In the absence of further guidance from the New Jersey courts, we believe that federal courts faced with a party

asserting New Jersey's good-faith defense may consider the above explication of §259, the requirements of which are, in all material respects, identical to those of the New Jersey statute. In particular, the District Court in this case could properly consider on remand the above discussion of "good faith" and of §259's "practice or policy" provision.

4. Summary

Although New Jersey caselaw is virtually nonexistent on the requirements of that state's good-faith defense to a failure to pay statutory overtime rates, we believe that the plain text of the good-faith provision, along with our own caselaw on the similar federal good-faith defenses and the detailed federal regulations interpreting those defenses, provide ample guidance in this area. First and foremost, New Jersey's good-faith defense is clearly unavailable when an employer is not relying on one of the enumerated sources in the statute, such as a regulation, practice, or policy of the state labor agency. Further, like the federal *good-faith* defenses, New Jersey's law requires good-faith reliance, and we have held that good faith is absent when the employer fails to investigate a law's requirements, or simply relies on a longstanding practice (of either the employer itself or its industry) of failing to pay overtime or on union acquiescence in such failure. We believe that, in the absence of further guidance from New Jersey's appellate courts, these standards should be used by federal courts evaluating an employer's good-faith claims under New Jersey law.

Appendix A

B. *Defendant's Pre-Regulation Failure to Pay Overtime*

In finding that defendant had adequately made out a good-faith defense for the period prior to enactment of the trucking industry regulation, the District Court pointed out that defendant's collective bargaining agreement with the relevant employees provided that, with certain exceptions not applicable here, "there will be no premium pay for hours worked over forty (40) in a workweek, and all such hours will be paid at the employee's straight-time rate." *Keeley*, 42 F. Supp. 2d at 452. Further, the court found that "there is no indication that any trucking industry employer in New Jersey has been required to pay its employees one and one-half times their regular hourly rate for overtime, either before or after the regulation was issued." *Id.* Finally, the court relied on a declaration by defendant's counsel that, during contract negotiations, "the Company representatives present believed that the Motor Carrier exemption of the [FLSA] preempted state law and that the employees other than vault personnel were exempt from any overtime pay requirements." *Id.* at 452 n.10 (alteration in original).

For a number of reasons, we do not believe that these factors provide sufficient support for a finding that the defendant's failure to pay overtime prior to August 5, 1996, fell under the good-faith defense of the New Jersey statute. First and foremost, the statute clearly requires that the good-faith belief be based on either (1) a written regulation, order, ruling, approval or interpretation from one of the designated state authorities or (2) an "administrative practice or enforcement policy" of the relevant state agencies. Yet neither the factors cited by the District Court nor anything

we can find in the record indicates that, prior to August 5, 1996, defendant relied on a written document, practice, or enforcement policy of the state labor department in not paying its employees time-and-a-half for overtime work.

Further, looking to *Williams* and *Martin*, and the federal regulations, as providing an interpretative source for the New Jersey statute, it is unclear what affirmative steps the defendant took to ascertain the overtime law's requirements before promulgation of the regulation. It apparently relied primarily on industry practice, but if this is insufficient for the lower standard in §260, as *Williams* and *Martin* held, it would almost certainly be insufficient for the higher standard of §259 — and of New Jersey's good-faith defense.

Finally, we note that the good-faith defense was accepted by the District Court at the summary judgment stage, following minimal discovery. Further discovery may (or may not) reveal that the defendant knew that it was violating state law by not paying its employees overtime, but sought to avoid the consequences of its actions by inducing the union to agree to the overtime "waiver." Other ramifications of the good-faith defense could emerge in discovery that create issues that need eventual resolution by a finder of fact.[12]

The defendant argues that plaintiffs may not now contend that discovery is needed on the good-faith defense, as they took the position before the District Court that further discovery was not necessary. *See* Appellee's Br. at 21 n.18.

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12. We note that the burden to plead and prove good faith is on the defendant.

However, the plaintiffs reasonably believed that the District Court was ruling only on the validity of the trucking industry regulation, and not on defendant's good-faith defense, when they declined to request further discovery. *See* J.A. at 51 (Magis. Order of July 1, 1998) (ordering the "parties to cross-move for summary judgment on validity of N.J.A.C. 12:56-19.3"). We therefore will reverse the District Court's judgment in defendant's favor for the period before the regulation's enactment. We also leave it for the District Court on remand to determine what, if any, discovery is necessary and appropriate for adjudication of defendant's good-faith defense.

C. *Defendant's Post-Regulation Failure to Pay Overtime*

Because it found the regulation valid, the District Court did not reach the issue whether the company had demonstrated a good-faith defense for its post-regulation failure to pay overtime. *See Keeley*, 42 F. Supp. 2d at 451 n.9. It appears that, for its post-regulation conduct, the company was relying on a written regulation to justify its failure to pay overtime. However, the record is silent on this issue, and therefore we will leave it for the District Court on remand to determine whether defendant acted in good faith in not paying its employees overtime following promulgation of the regulation.

V. Conclusion

Defendant Loomis Fargo may not invoke the regulation governing trucking industry employees as a justification for its failure to pay overtime. We find that the Commissioner

exceeded his authority in enacting this regulation. If the defendant relied in good faith on this regulation in its failure to pay the statutory overtime rate, it may avoid liability for the period following the regulation's enactment (on August 5, 1996) under New Jersey's statutory good-faith defense. We leave this issue for the District Court to determine on remand. Finally, following any appropriate discovery, the District Court should also revisit on remand whether defendant was relying on an administrative regulation, order, practice, or policy in not paying overtime prior to August 5, 1996, as is required by New Jersey's good-faith defense.

For the foregoing reasons, the judgment of the District Court will be reversed, and the case remanded for further proceedings consistent with this opinion.[13]

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13. Plaintiffs belatedly argue on appeal that we should order the District Court to remand this case to state court under the doctrine known as *Burford* abstention. We believe that this argument has no merit. *Burford* abstention applies when a federal court is asked to enjoin a state administrative order that will injure the plaintiff (such as an order granting an oil drilling permit to a competitor or denying the plaintiff permission to discontinue an unprofitable line of business). As the Supreme Court has put it:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case

(Cont'd)

Appendix A

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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(Cont'd)

> and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (citation omitted); *see also Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 956 (3d Cir. 1993).

The present case primarily involves a claim for damages, not equitable relief. Further, there are no "proceedings or orders of state administrative agencies" at issue here, only state regulations of general applicability. Cases implicating *Burford* abstention involve state orders against an individual party that a federal-court plaintiff seeks to enjoin. Here, there is a state regulation that affects all trucking industry employers, not a specific administrative order aimed at one party. Therefore, abstention under *Burford* is clearly inappropriate.

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-6428

JOHN KEELEY; TIMMIE ORANGE;
ARIEL KILPATRICK; CHARLES WERDANN,
on behalf of themselves and others similarly situated,

Appellants

v.

LOOMIS FARGO & CO.

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civ. No. 97-cv-06207)
District Judge: Honorable Dickinson R. Debevoise

Present: Becker, *Chief Judge*, Rendell and Rosenn, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on May 18, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 15, 1998, be, and the same is hereby

reversed and the cause is remanded to the District Court for further proceedings consistent with the opinion of this Court. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: July 19, 1999

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED OCTOBER 13, 1998 AND FILED OCTOBER 15, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 97-6207 (DRD)

JOHN KEELEY, TIMMIE ORANGE, ARIEL KILPATRICK and CHARLES WERDANN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LOOMIS FARGO & CO.,

Defendant.

OPINION

* * *

DEBEVOISE, Senior District Judge.

In this action for overtime pay the plaintiffs and defendant, Loomis Fargo & Co. ("Loomis Fargo"), cross-move for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, Loomis Fargo's motion will be granted and the plaintiffs' motion will be denied.

Appendix B

BACKGROUND AND PROCEDURAL HISTORY

The plaintiffs are four New Jersey residents presently or formerly employed by Loomis Fargo or its predecessor, Wells Fargo Armored Services Corp. ("Wells Fargo") at its Lyndhurst, New Jersey facility. The plaintiffs are and have been employed by Loomis Fargo in various positions, including guard, driver-guard, messenger-guard and ATM technician. Since April 1997 plaintiff Keeley has worked full-time for the United Armed Guards of America union (the "Union").

Loomis Fargo is a trucking industry employer subject to the jurisdiction of the United States Secretary of Transportation pursuant to the Motor Carrier Act, 49 U.S.C. § 31501 *et seq.*, and is thereby exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 213(b)(1). The State of New Jersey has its own minimum wage and overtime statute, N.J.S.A. 34:11-56a4, which establishes a minimum wage rate of $5.05 per hour and requires payment of wages at one and one-half times an "employee's regular hourly wage for each hour of working time in excess of 40 hours in any week."

In July 1996 the New Jersey Department of Labor promulgated N.J.A.C. 12:56-19.1 to 19.3, which became effective on August 5, 1996. Loomis Fargo falls within the definition of a "trucking industry employer" set forth in N.J.A.C. 12:56-19.1. The regulation provides that trucking industry employees will be paid the New Jersey minimum wage. N.J.A.C. 12:56-19.2. It also provides for payment of

overtime at a rate not less than one and one-half times the New Jersey minimum wage. N.J.A.C. 12:56-19.3.[1]

In the course of employment by Loomis Fargo, the plaintiffs have consistently worked in excess of 40 hours per week. They have been compensated for their overtime hours at their regular hourly rate of pay pursuant to a renewal collective bargaining agreement between Wells Fargo and the Union effective November 1, 1995.[2] Plaintiff Keeley was the Union's chief negotiator and the plaintiffs' counsel in this action represented the Union during contract negotiations with Wells Fargo. Vaughan Decl. ¶ 2.

The plaintiffs commenced this lawsuit in the Superior Court of New Jersey, Law Division, Union County on November 13, 1997, to i) recover for themselves and for the class of similarly situated employees payment for their overtime labor at the rate required by the New Jersey Wage and Hour Law and ii) obtain injunctive relief mandating future compliance with the law. The plaintiffs seek certification of a class consisting of all persons employed

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1. Because New Jersey's minimum wage is $5.05, under N.J.A.C. 12:56-19.3 trucking industry employees must be paid $7.575 per overtime hour worked.

2. The collective bargaining agreement provides in relevant part: "Except for vault personnel, there will be no premium pay for hours worked over forty (40) in a workweek, and all such hours will be paid at the employee's straight-time rate. If the federal law is subsequently changed or a state law enacted to affect the overtime premium, the Company will fully abide by that change in the law." Vaughan Decl. Ex. 1 at 23.

by Loomis Fargo as guards, driver-guards, messenger-guards and ATM technicians who have earned but have not received overtime pay at the rate prescribed by New Jersey law. Loomis Fargo removed the action to this Court pursuant to 28 U.S.C. § 1441 on the basis of the complete diversity of the parties.[3] Loomis Fargo's December 19, 1997 Answer to the Complaint alleged, *inter alia*, that the plaintiffs' claims were preempted by federal law.

By order dated February 25, 1998 Magistrate Judge Ronald J. Hedges directed Loomis Fargo to file a motion to dismiss based on its preemption defense. Certification of the plaintiff class and discovery by the parties were stayed pending the outcome of the motion. On June 12, 1998 this Court denied Loomis Fargo's motion, finding that New Jersey's overtime law was not preempted by the FLSA. *Keeley v. Loomis Fargo & Co.*, No. 97-6207, 1998 WL 381596 (D.N.J. June 12, 1998).

In their brief opposing Loomis Fargo's motion to dismiss, the plaintiffs had argued that New Jersey's overtime law should require overtime compensation to trucking industry employees based not on the state minimum wage as required by N.J.A.C. 12:56-19.3 but based instead on their regular hourly rate. However, their argument for striking down this regulation went beyond the scope of Loomis Fargo's motion to dismiss on preemption grounds and was not addressed at that time. *Id.* at *2 n.2.

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3. Loomis Fargo is a Delaware corporation and maintains its principal place of business in Houston, Texas.

Appendix B

Magistrate Judge Hedges ordered the parties to cross-move for summary judgment concerning the validity of N.J.A.C. 12:56-19.3, and these motions are now before this Court. On July 20, 1998 the parties entered into a stipulation, for purposes of these motions, that between November 1995 and November 1997[4] the wages paid by Loomis Fargo to the named plaintiffs were at an hourly rate that exceeds $7.575, one and one-half times the New Jersey minimum wage.[5]

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

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4. Because the New Jersey Wage and Hour Law has a two-year statute of limitations, N.J.S.A. 34:11-56a25.1, the relevant time period is from November 13, 1995 through November 13, 1997, the date the complaint in this action was filed in state court.

5. The hourly wages were $10.80 for John Keeley; $11.05 for Timmie Orange; $8.45 for Ariel Kilpatrick; and $7.50 for Charles Werdann from July 20, 1996 to September 28, 1996 and $8.25 thereafter. Werdann was underpaid $.075 per hour for the overtime hours he worked from the effective date of N.J.A.C. 12:56-19.3 to September 28, 1996 and Loomis Fargo has since sent a check to Werdann for the amount he was underpaid.

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Sound Ship Bldg. Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 247-248.

ANALYSIS

The plaintiffs argue that N.J.A.C. 12:56-19.3 is void as an invalid exercise of regulatory authority because i) the effect of the regulation is to create a motor carrier exemption contrary to legislative intent and ii) the promulgation of the regulation was an *ultra vires* exercise of agency authority. Loomis Fargo contends that the plaintiffs have failed to satisfy their burden of proving that the regulation is invalid and that the claims against it must therefore be dismissed because its overtime payments to the plaintiffs comply with the requirements of N.J.A.C. 12:56-19.3.

Appendix B

The Appellate Division of the New Jersey Superior Court has recognized the heavy burden facing a party challenging the validity of an agency regulation:

> An agency regulation is presumptively valid, and therefore the party challenging it bears the burden of proving its invalidity. The presumption of validity follows if the regulation is within the authority delegated to the agency and is not on its face beyond the agency's power. In considering the grant of authority, courts look to the fair contemplation of the delegation of the enabling statute. And while a regulation cannot alter the terms of a statute or frustrate the legislative policy, courts place great weight on the interpretation of legislation by the administrative agency enforcing it.

E.I. du Pont de Nemours and Co. v. State of New Jersey, 283 N.J. Super. 331, 339-340, (App. Div. 1995) (citations and internal quotation marks omitted). As a result, N.J.A.C. 12:56-19.3 is presumptively valid if it "is within the authority delegated to the agency and is not on its face beyond the agency's power." *Id.* at 339. The enabling statute and regulatory history must be reviewed in order to determine if the Department of Labor's promulgation of N.J.A.C. 12:56-19.3 was an invalid exercise of agency authority.

N.J.S.A. 34:1A-3(e) gives the Commissioner of the New Jersey Department of Labor the authority to "[a]dopt, issue and promulgate, in the name of the department, such rules and regulations as may be authorized by law." The

Appendix B

Commissioner is authorized to appoint a wage board if he "is of the opinion that a substantial number of employees in any occupation or occupations are receiving less than a fair wage," and the role of the wage board is "to report upon the establishment of minimum fair wage rates for employees in such occupation or occupations." N.J.S.A. 34:11-56a8. Wage boards are authorized to, *inter alia*, "recommend establishment or modification of the number of hours per week after which the overtime rate . . . shall apply and may recommend the establishment or modification of said overtime rate." N.J.S.A. 34:11-56a13.

Reports containing wage board recommendations are submitted to the Commissioner, N.J.S.A. 34:11-56a14, who accepts or rejects the reports. N.J.S.A. 34:11-56a15. Those recommendations accepted by the Commissioner are then published together with other proposed administrative regulations and a public hearing is held. N.J.S.A. 34:11-56a15. If the Commissioner then approves the wage board's report, he makes a wage order, including such proposed administrative regulations as embody the recommendations of the wage board. N.J.S.A. 34:11-56a16. Regulations defining and governing overtime rates are expressly allowed. *Id.*

In the present case, the Commissioner appointed a wage board because at the time N.J.A.C. 12:56-19.1 to 19.3 were being considered, the "assumption was that overtime was not required" for trucking industry employees under New Jersey law. 28 N.J.R. 3799. However, "recent court cases [ ] raised an issue as to whether overtime was required in New Jersey" for such employees. *Id.* Based upon this uncertainty

in the law, the trucking industry petitioned the Department to provide guidance as to whether employees in the industry were entitled under New Jersey law to a premium for overtime hours worked. *Id.*

Once constituted, the wage board gathered and considered relevant information on this topic. "[I]n determining the applicable fair rate of pay and reaching [a] conclusion with regard to the effect of the regulation on workers, the Board considered economic data from the region and across the country." *Id.* For instance, it "carefully considered wage survey information provided by [the] state Office of Labor Research and Analysis," and information regarding "the average wages paid in New Jersey and neighboring states and the country." *Id.* The wage board also considered the law of other states, noting that "less than five states require any kind of overtime premium for the trucking . . . industry." *Id.* The board further conducted surveys, which "indicate[d] that the industry standard is not to pay overtime based on the FLSA exemption." *Id.* It also considered the fact that the assumption had been that New Jersey law, like federal law and the law of almost every other state, did not require any premium to be paid to trucking industry employees for overtime hours worked. *Id.*

The wage board proposed, in its first report, that there be no requirement that trucking industry employees be paid any premium for overtime. *Id.* However, the Commissioner rejected that recommendation and "directed the Wage Board to consider the impact on the lowest paid workers." *Id.* The wage board reconvened and ultimately issued a second report, recommending that trucking industry employees be paid one

and one-half times the New Jersey minimum wage for overtime hours worked. The Commissioner accepted the second report and published the report together with the proposed administrative regulation pursuant to N.J.S.A. 34:11-56a15. The Commissioner also scheduled and gave notice of a public hearing pursuant to that provision. The hearing was held on April 11, 1996 at the New Jersey Department of Labor in Trenton, and Christopher L. Leavey, the Assistant to the Commissioner, was present and received testimony. 28 N.J.R. 3798. After public testimony was taken and considered, the hearing officer recommended that the regulation be adopted. The Commissioner adopted the regulation, which was codified at N.J.A.C. 12:56-19.3 and became effective August 5, 1996.

I. *Effect of the Regulation*

The plaintiffs' first argument, that N.J.A.C. 12:56-19.3 should be struck down because its effect is to create a motor carrier exemption contrary to legislative intent, is unpersuasive. It is true that the practical effect of N.J.A.C. 12:56-19.3 is that the plaintiffs are not entitled to any premium for overtime hours worked. However, this is because they earn more for every hour worked than they must be paid for overtime hours worked, *see* July 20, 1998 Joint Stipulation, not because trucking industry employers are exempt from New Jersey's overtime pay requirements. As discussed above, the basis for overtime pay under the regulation is the state minimum wage and not the employee's hourly rate. The Commissioner explained that N.J.A.C. 12:56-19.3 "*relaxes* New Jersey's statutorily set overtime requirements for certain employees in the trucking industry

to one and one-half times the minimum wage" and does not eliminate overtime for trucking industry employees altogether as initially proposed by the wage board. 28 N.J.R. 3800 (emphasis added).

Moreover, while the general rule of construction is that "enumerated exceptions in a statute indicate a legislative intent that the statute be applied to all cases not specifically excepted," *State of New Jersey v. Reed*, 34 N.J. 554, 558 (1961), this general rule does not apply here because New Jersey's Wage and Hour Law clearly authorizes the modification of overtime rates for a particular occupation by administrative regulation. N.J.S.A. 34:1A-3(e); N.J.S.A. 34:11-56a16. In light of the legislature's express authorization of the modification of overtime rates by administrative regulation, the New Jersey legislature's failure to amend the Wage and Hour Law to add a special overtime provision for trucking industry employees similar to the one it recently added for certain limousine drivers also does not support an inference that the legislature is opposed to such a provision. As the New Jersey Supreme Court has recognized, "legislative inaction has been called a weak reed upon which to lean and a poor beacon to follow in construing a statute." *Amerada Hess Corp. v. Director, Div. of Taxation*, 107 N.J. 307, 322 (1987) (citation and internal quotation marks omitted), *aff'd*, 490 U.S. 66 (1989).

In addition, although they were all paid more than one and one-half times the minimum wage the plaintiffs contend that the effect of the regulation is that they are not paid a fair wage. This argument is without merit. "Fair wage" is defined under the Wage and Hour Law as "a wage fairly and

reasonably commensurate with the value of the service or class of service rendered and sufficient to meet the minimum cost of living necessary for health." N.J.S.A. 34:11-56a1(k). The wage board considered a wealth of information in evaluating whether trucking industry employees were being paid a fair wage[6] and concluded that it was "pleased" with the wages paid to such employees. 28 N.J.R. 3799. The wage board also weighed the benefits of overtime premiums against the possibility that jobs would be lost and trip rates would decline if trucking industry employees were required to be paid overtime wages of one and one-half times their regular hourly rate, and determined that a modified overtime premium based on the minimum wage should be established.

Moreover, it is notable that the plaintiffs' wages were negotiated by the Union and that the chief Union negotiator, plaintiff Keeley, was advised during the 1995 negotiations by counsel for the plaintiffs in this action. Vaughan Decl. ¶ 2. Presumably, the Union would not have negotiated an agreement under which the employees were paid an unfair wage. Indeed, "a principal purpose of any collective bargaining agreement [is] the assurance of a fair wage for everyone in the work place." *In re Mile Hi Metal Sys.*, 67 B.R. 114, 118 (D. Colo. 1986), *vacated on other grounds*,

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6. For instance, it "carefully considered wage survey information provided by [the] state office of Labor Research and Analysis," 28 N.J.R. 3799; "fully considered average wages paid in New Jersey and neighboring states and the country," *id.*; "considered economic data from the region and across the country," *id.*; and considered information obtained from the United States Department of Labor. *Id.*

899 F.2d 887 (10th Cir. 1990). As a result, it cannot be said that the plaintiffs receive less than a fair wage.

II. *Ultra Vires Exercise of Agency Authority*

The plaintiffs also argue that the promulgation of the regulation was an *ultra vires* exercise of agency authority, and they advance three reasons why the agency's actions were unauthorized: i) the wage board was convened for an improper purpose; ii) the wage board exceeded its statutory authority; and iii) the wage board acted contrary to the statutory policy.

A. *Purpose for Convening Wage Board*

Under the governing law the appointment of a wage board is authorized if the Commissioner "is of the opinion that a substantial number of employees in any occupation or occupations are receiving less than a fair wage." N.J.S.A. 34:11-56a8. The plaintiffs argue that the actions of the Commissioner in this instance were not to protect employee compensation because employees were then getting less than a fair wage, but rather to give an advantage to the employers with respect to out-of-state competition by allowing them to pay wages less than otherwise provided by law.

The Commissioner, however, explained that "[t]he Wage Board was convened because the application of the overtime provision could result in the flight of business with the resulting reduction in employment in this industry. Additionally, it could result in a disruption in the 'trip rate' paid to many drivers within this industry." 28 N.J.R. 3978(c)

at 3. Thus, the Commissioner was of the opinion that if the statute's overtime provision was applied to the trucking industry, employees could receive less than a fair wage in two respects: businesses might leave New Jersey, causing employees to lose their jobs altogether, and the trip rate paid to drivers could decline.

Moreover, the plaintiffs fail to present any authority to support their contention that the Commissioner should not have appointed the wage board because trucking industry employers brought this issue to his attention. Indeed, while the Commissioner stated that trucking industry *employers* requested that a wage board be convened, 28 N.J.R. 3799, he explained that he was also asked by the "trucking industry," presumably *employees*, to consider this issue and adopt regulations that would require that trucking industry employees be paid overtime:

> The trucking industry is somewhat different than other industries in that the Federal and state governments have not required overtime for employees covered by this regulation. The assumption was that overtime was not required. However, recent court cases have raised an issue as to whether overtime was required in New Jersey. *As a result of these cases, the industry petitioned the Department to adopt regulations which would require overtime for these employees.*

Id. (emphasis added). Therefore, it cannot be said that the Commissioner convened the wage board for the purpose of

blindly doing the bidding of trucking industry employers, and this conclusion is reinforced by the fact that the Commissioner rejected the wage board's first proposal (which did not provide for any overtime premium whatsoever) and sent the board back "to consider the impact on the lowest paid workers." *Id.*

B. *Wage Board's Statutory Authority*

The plaintiffs also argue that the Department of Labor exceeded its statutory authority under N.J.S.A. 34:11-56a13 to establish or modify overtime rates because the Department's power to modify "does not authorize it to define them out of existence." Pl. Br. at 19. This argument is unavailing because, as discussed above, the wage board did not carve out administratively a motor carrier exemption by promulgating the regulation; rather, it "relaxe[d] New Jersey's statutorily set overtime requirements for certain employees in the trucking industry to one and one-half times the minimum wage" after rejecting the proposal to eliminate the overtime premium altogether. 28 N.J.R. 3800.

In addition, it should be noted that the plaintiffs' reliance on *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), is misplaced because that case is distinguishable on its facts. *MCI Telecommunications* concerned regulations issued by the Federal Communications Commission ("FCC") to facilitate competition in the long distance telephone industry. The Supreme Court found that the FCC properly issued regulations relaxing some of the tariff filing requirements for non-dominant carriers (i.e., all carriers other than AT&T)

but that it exceeded its statutory authority to modify tariff requirements when it issued a regulation completely eliminating those filing requirements. N.J.A.C. 12:56-19.3 is much more limited in scope than the detariffing regulation issued by the FCC in *MCI Telecommunications* because N.J.A.C. 12:56-19.3 is not a "fundamental revision of the statute," 512 U.S. at 231, nor does it affect all New Jersey employers except one.[7]

C. *Statutory Policy*

The plaintiffs argue that the wage board acted contrary to the statutory policy. They contend that in "depriving motor carrier employees of overtime compensation as enjoyed by other categories of workers, the regulation affirmatively works against the policy of protecting these workers from wage levels detrimental to their health, efficiency and well-being." Pl. Br. at 20.

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7. Indeed, the Supreme Court itself distinguished permissible FCC modifications to the statute's tariff filing requirements from the detariffing policy at issue:

> We do not mean to suggest that the tariff-filing requirement is so inviolate that the Commission's existing modification authority does not reach it at all. Certainly the Commission can modify the form, contents, and location of required filings, and can defer filing or perhaps even waive it altogether in limited circumstances. But what we have here goes well beyond that. It is effectively the introduction of a whole new regime of regulation. . . .

MCI Telecommunications, 512 U.S. at 234.

The thrust of the plaintiffs' argument is that "[i]f the regulation is enforced, plaintiffs . . . will likely work longer hours, to the detriment of their health, efficiency and well-being." *Id.* However, as the plaintiffs acknowledge, the Federal Motor Carrier Act "regulates safety by setting maximum numbers of hours to be worked." *Id.* at 22 (quoting *Pettis Moving Co. v. Roberts*, 784 F.2d 439, 441 (2d Cir. 1986)).[8] In addition, the plaintiffs' argument ignores the fact that the enforcement of the regulation would simply continue the status quo because they are not now, and apparently never have been, paid one and one-half times their regular hourly rate for overtime. There is no indication that a continuation of the status quo would endanger the plaintiffs' health and well-being and, as discussed above, the plaintiffs are paid a fair wage.

Moreover, as the Commissioner noted, the "Wage Board recommendation is consistent with the policy of the vast majority of states," 28 N.J.R. 3799, and there is no evidence that the plaintiffs' dire predictions have occurred in any of the other states that follow this policy. Thus, it cannot be said that the wage board acted contrary to the statutory policy.

III. *Pre-Regulation Overtime Pay*

Finally, the plaintiffs argue that even if this Court upholds the regulation they are entitled to overtime premium payments under N.J.S.A. 34:11-56a4 for the nine-month

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8. N.J.A.C. 12:56-19.3 by its own terms applies only to those trucking industry employees "for whom the Secretary of Transportation may prescribe maximum hours of work for the safe operation of vehicles" pursuant to the Federal Motor Carrier Act.

period from November 13, 1995 to August 5, 1996, the date the regulation became effective. Their argument is unavailing because Loomis Fargo has established a good faith defense to the plaintiffs' claim for pre-regulation overtime pay.[9]

An employer may assert a good faith defense to a claim for liability for overtime pay pursuant to N.J.S.A. 34:11-56a25.2:

> [N]o employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under this act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner of the Department of Labor and Industry or the Director of the Wage and Hour Bureau, or any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged. Such a defense, if established, shall be a complete bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined

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9. Because the regulation will not be set aside, Loomis Fargo's contention that its good faith reliance on the validity of the regulation is also a bar to this action need not be addressed.

> by judicial authority to be invalid or of no legal effect.

"Good faith is generally defined as honesty of intention and freedom from circumstances which ought to put the holder upon inquiry." *New Jersey v. Frech Funeral Home*, 185 N.J. Super. 385, 393 (Law Div. 1982) (*citing Siano v. Helvering*, 13 F. Supp. 776, 780 (D.N.J. 1936)).

As noted by the Commissioner in his report, "the Federal and state governments ha[d] not required overtime for employees covered by this regulation. *The assumption was that overtime was not required.*" 28 N.J.R. 3799 (emphasis added). The plaintiffs and Loomis Fargo similarly operated under the assumption that New Jersey's overtime provision was preempted by federal law. The collective bargaining agreement that became effective November 1, 1995 provided that "[e]xcept for vault personnel [who are not covered by the FLSA's Motor Carrier exemption], there will be no premium pay for hours worked over forty (40) in a workweek, and all such hours will be paid at the employee's straight-time rate." Vaughan Decl. Ex. 1 at 23. The agreement further stated that "[i]f the federal law is subsequently changed or a state law enacted to affect the overtime premium, the Company will fully abide by that change in the law." *Id.*

This language demonstrates both Loomis Fargo's and the plaintiffs' good faith belief that, at the time the agreement was entered into, no overtime premium was required under either federal or state law.[10] In addition, there is no indication

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10. David M. Vaughan, Esq., counsel for Loomis Fargo, similarly states in his declaration:

(Cont'd)

that any trucking industry employer in New Jersey has been required to pay its employees one and one-half times their regular hourly rate for overtime, either before or after the regulation was issued, or that before the regulation was adopted the plaintiffs demanded overtime pay from Loomis Fargo. The New Jersey Supreme Court in *Frech Funeral Home*, the only reported case discussing the good faith defense under N.J.S.A. 34:11-56a25.2, similarly based its finding that the defendant, a funeral home that did not pay its mortician trainees a premium for overtime based on its belief that they were professionals and thus exempt from the statute, acted in good faith in part on evidence that other funeral home owners did not pay their mortician trainees a premium for overtime and that the employees never demanded it. *Frech Funeral Home*, 185 N.J. Super. at 396-397.

In light of the foregoing, Loomis Fargo had a good faith belief that the plaintiffs were exempt from any overtime

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(Cont'd)

> During the negotiation of the 1995 collective bargaining agreement, the Company representatives present believed that the Motor Carrier exemption of the [FLSA] preempted state law and that the employees other than vault personnel were exempt from any overtime pay requirements. At that time, this appeared to be the law in every state in which the Company operated its business facilities. As a result, the contracting parties agreed that the employees covered by the FLSA Motor Carrier exemption would be paid their regular hourly rate for overtime worked. . . .

Vaughan Decl. ¶ 3.

requirements and thus it is not liable for any pre-regulation overtime payments to the plaintiffs.

CONCLUSION

For the reasons set forth above, Loomis Fargo's motion will be granted and the plaintiffs' motion will be denied. An appropriate order follows.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.S.D.J.

Dated: October 13, 1998

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 97-6207 (DRD)

JOHN KEELEY, TIMMIE ORANGE, ARIEL KILPATRICK and CHARLES WERDANN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LOOMIS FARGO & CO.,

Defendant.

ORDER

This matter having been opened to the Court by the attorneys for the parties on cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56; and the Court having considered the submissions of the parties; for good cause shown; and for the reasons set forth in the Court's opinion of even date,

IT IS, this 13th day of October, 1998 ORDERED as follows:

Appendix B

1. The motion of the defendant is granted.

2. The motion of the plaintiffs is denied.

3. The complaint is dismissed with prejudice.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 27, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-6428

JOHN KEELEY; TIMMIE ORANGE;
ARIEL KILPATRICK; CHARLES WERDANN,
on behalf of themselves and all others similarly situated,

Appellants

v.

LOOMIS FARGO & CO.
(D.C. Civ. No. 97-cv-06207)

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH
McKEE, RENDELL, and ROSENN,*
Circuit Judges,

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petitions for rehearing filed by Appellee and having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in

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* As to panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petitions for rehearing are DENIED.

BY THE COURT:

s/ [illegible]
Chief Judge

DATED: **AUG 27 1999**

APPENDIX D — RELEVANT STATUTES AND CODES

N.J.S.A. § 34:1A-3 (1999)

§ 34:1A-3. Duties of Commissioner

The commissioner, as head of the department, shall:

(a) Administer the work of the department;

(b) Appoint and remove officers and other personnel employed within the department, subject to the provisions of Title 11 of the Revised Statutes, Civil Service, and other applicable statutes, except as herein otherwise specifically provided;

(c) Perform, exercise and discharge the functions, powers and duties of the department through such divisions as may be established by this act or otherwise by law;

(d) Organize the work of the department in such divisions, not inconsistent with the provisions of this act and in such bureaus and other organizational units as he may determine to be necessary for efficient and effective operation;

(e) Adopt, issue and promulgate, in the name of the department, such rules and regulations as may be authorized by law;

(f) Formulate and adopt rules and regulations for the efficient conduct of the work and general administration of the department, its officers and employees;

(g) Institute or cause to be instituted such legal proceedings or processes as may be necessary properly to enforce and give effect to any of his powers or duties;

(h) Make an annual report to the Governor and to the Legislature of the department's operations, and render such other reports as the Governor shall from time to time request or as may be required by law;

(i) Co-ordinate the activities of the department, and the several divisions and other agencies therein, in a manner designed to eliminate overlapping and duplicating functions;

(j) Integrate within the department, so far as practicable, all staff services of the department and of the several divisions and other agencies therein; and

(k) Perform such other functions as may be prescribed in this act or by any other law.

* * *

N.J.S.A. § 34:11-56a (1999)

§ 34:11-56a. Minimum wage level; establishment

It is declared to be the public policy of this State to establish a minimum wage level for workers in order to safeguard their health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being.

* * *

Appendix D

N.J.S.A. § 34:11-56a4 (1999)

§ 34:11-56a4. Minimum wage rate; exemptions

Every employer shall pay to each of his employees wages at a rate of not less than $5.05 per hour as of April 1, 1992 and, after January 1, 1999, the minimum hourly wage rate set by section 6(a)(1) of the federal "Fair Labor Standards Act of 1938" (29 U.S.C. s.206(a)(1)) for 40 hours of working time in any week and 1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week, except this overtime rate shall not include any individual employed in a bona fide executive, administrative, or professional capacity or, if an applicable wage order has been issued by the commissioner under section 17 (C.34:11-56a16) of this act, not less than the wages prescribed in said order. The wage rates fixed in this section shall not be applicable to part-time employees primarily engaged in the care and tending of children in the home of the employer, to persons under the age of 18 not possessing a special vocational school graduate permit issued pursuant to section 15 of P.L.1940, c.153 (C.34:2-21.15), or to persons employed as salesmen of motor vehicles, or to persons employed as outside salesmen as such terms shall be defined and delimited in regulations adopted by the commissioner, or to persons employed in a volunteer capacity and receiving only incidental benefits at a county or other agricultural fair by a nonprofit or religious corporation or a nonprofit or religious association which conducts or participates in that fair.

The provisions of this section for the payment to an employee of not less than 1 1/2 times such employee's regular

hourly rate for each hour of working time in excess of 40 hours in any week shall not apply to employees engaged to labor on a farm or employed in a hotel or to an employee of a common carrier of passengers by motor bus or to a limousine driver who is an employee of an employer engaged in the business of operating limousines or to employees engaged in labor relative to the raising or care of livestock.

Employees engaged on a piece-rate or regular hourly rate basis to labor on a farm shall be paid for each day worked not less than the minimum hourly wage rate multiplied by the total number of hours worked.

Full-time students may be employed by the college or university at which they are enrolled at not less than 85% of the effective minimum wage rate.

* * *

N.J.S.A. § 34:11-56a8 (1999)

§ 34:11-56a8. Appointment of wage board; report upon establishment of minimum fair wage rates

If the commissioner is of the opinion that a substantial number of employees in any occupation or occupations are receiving less than a fair wage, he shall appoint a wage board as provided in section 10 of this act to report upon the establishment of minimum fair wage rates for employees in such occupation or occupations.

* * *

Appendix D

N.J.S.A. § 34:11-56a13 (1999)

§ 34:11-56a13. Recommendations of wage board

The report of the wage board shall recommend minimum fair wage rates, on an hourly, daily or weekly basis for the employees in the occupation or occupations for which the wage board was appointed. The wage board may recommend establishment or modification of the number of hours per week after which the overtime rate established in section 5 shall apply and may recommend the establishment or modification of said overtime rate. The board may also recommend permitted charges to the employees or allowances for board, lodging, apparel, or other facilities or services customarily furnished by the employer to the employee; or allowances for such other special conditions or circumstances excluding gratuities which may be usual in a particular employer-employee relationship. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair wage rates for different employments. It may recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper.

A wage board may recommend a suitable scale of rates for learners and apprentices or students in any occupation which may be less than the regular minimum fair wage rates recommended for experienced employees.

* * *

Appendix D

N.J.S.A. § 34:11-56a15 (1999)

§ 34:11-56a15. Acceptance or rejection of report by commissioner

On submission of the report of a wage board the commissioner shall within 10 days confer with the director and accept or reject the report.

If he rejects the report, he shall resubmit the matter to the same wage board or to a new wage board with a statement of his reasons for the rejection.

If he accepts the report, it shall be published within 30 days together with such proposed administrative regulations as the commissioner after conferring with the director may deem appropriate to supplement the report of the wage board and to safeguard the minimum fair wage standards to be established.

At the same time notice shall be given of a public hearing before the commissioner or the director, not sooner than 15 nor more than 30 days after such publication, at which all persons favoring or opposing the recommendations contained in the report or the proposed regulations may be heard.

* * *

Appendix D

N.J.S.A. § 34:11-56a16 (1999)

§ 34:11-56a16. Approval or disapproval of report following public hearing; effective date of wage order

Within 10 days after the hearing the commissioner shall confer with the director and approve or disapprove the report of the wage board. If the report is disapproved the commissioner may resubmit the matter to the same wage board or to a new wage board. If the report is approved, the commissioner shall make a wage order which shall define minimum fair wage rates in the occupation or occupations as recommended in the report of the wage board and which shall include such proposed administrative regulations as the commissioner may deem appropriate to supplement the report of the wage board and to safeguard the minimum fair wage standards established. Such administrative regulations may include among other things, regulations defining and governing learners and apprentices, their rates, number, proportion or length of service; piece rates or their relations to time rates; overtime or part-time rates, bonuses or special pay for special or extra work; deductions for board, lodging, apparel or other items or services supplied by the employer; and other special conditions or circumstances excluding gratuities; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, the commissioner may provide in such regulations without departing from the basic minimum rates recommended by the wage board such modifications or reductions of or addition to such rates in or for such special cases or classes of cases as those herein enumerated as the commissioner may find appropriate to safeguard the basic

minimum rates established. Said wage order shall take effect upon expiration of 180 days from the date of the issuance of the order.

* * *

N.J.S.A. § 34:11-56a25.1 (1999)

§ 34:11-56a25.1. Limitations; commencement of action

No claim for unpaid minimum wages, unpaid overtime compensation, or other damages under this act shall be valid with respect to any such claim which has arisen more than 2 years prior to the commencement of an action for the recovery thereof. In determining when an action is commenced, the action shall be considered to be commenced on the date when a complaint is filed with the Commissioner of the Department of Labor and Industry or the Director of the Wage and Hour Bureau, and notice of such complaint is served upon the employer; or, where an audit by the Department of Labor and Industry discloses a probable cause of action for unpaid minimum wages, unpaid overtime compensation, or other damages, and notice of such probable cause of action is served upon the employer by the Director of the Wage and Hour Bureau; or where a cause of action is commenced in a court of appropriate jurisdiction.

* * *

Appendix D

N.J.S.A. § 34:11-56a25.2 (1999)

§ 34:11-56a25.2. Defense to action

In any action or proceeding commenced prior to or on or after the date of the enactment of this act based on any act or omission prior to or on or after the date of the enactment of this act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under this act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval or interpretation by the Commissioner of the Department of Labor and Industry or the Director of the Wage and Hour Bureau, or any administrative practice or enforcement policy of such department or bureau with respect to the class of employers to which he belonged. Such a defense, if established, shall be a complete bar to the action or proceeding, notwithstanding, that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * *

N.J.A.C. § 12:56-3.1

§ 12:56-3.1 Statutory minimum wage rates for specific years

(a) Except as provided in N.J.A.C. 12:56-3.2, employees shall be paid minimum wage rates of not less than:

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1. $ 3.80 per hour for each hour of working time, effective May 3, 1990;

2. $ 4.25 per hour for each hour of working time, effective April 1, 1991; and

3. $ 5.05 per hour for each hour of working time, effective April 1, 1992.

* * *

N.J.A.C. § 12:56-19.1

§ 12:56-19.1 Trucking industry employer defined

"Trucking industry employer" means any business or establishment primarily operating for the purpose of conveying property from one place to another by road or highway, and includes the storage and warehousing of goods and property. Such an employer must also be subject to the jurisdiction of the Secretary of Transportation pursuant to the Federal Motor Carrier Act, 49 U.S.C. § 31501 et seq., whose employees are exempt under Section 13(b)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(b)(1), which provides an exemption to employees regulated by Section 204 of the Federal Motor Carrier Act and Interstate Commerce Act.

* * *

Appendix D

N.J.A.C. § 12:56-19.3

§ 12:56-19.3 Overtime rates

Every trucking industry employer shall pay to all drivers, helpers, loaders and mechanics for whom the Secretary of Transportation may prescribe maximum hours of work for the safe operation of vehicles pursuant to 49 U.S.C. § 31502(b) an overtime rate not less than one and one-half times the minimum wage required pursuant to N.J.S.A. 34:11-56a4 and N.J.A.C. 12:56-3.1.

* * * *